RASIP HAMSUDI & ORS v. PACIFIC & ORIENT INSURANCE CO BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
VAZEER ALAM MYDIN MEERA J
[ORIGINATING SUMMONS NO: 24NCVC-208-02-2015]
30 JULY 2015

CIVIL PROCEDURE: *Declaratory judgment – Application to quash – Action for negligence in vehicular collision – Action commenced in Sessions Court – First defendant filed action in High Court pending Sessions Court suit – Claim for declaratory relief that policy insurance void and unenforceable in High Court – High Court allowed first defendant's claim while Sessions Court suit held in favour of plaintiffs – Application by plaintiffs to quash declaratory order and to declare policy valid*

ROAD TRAFFIC: *Insurance – Notice of proceedings – Negligence in vehicular collision – Action commenced in Sessions Court – First defendant filed action in High Court pending Sessions Court suit – Claim for declaratory relief that policy insurance void and unenforceable in High Court – High Court allowed first defendant's claim while Sessions Court suit held in favour of plaintiffs – Whether plaintiffs notified of High Court suit – Whether facts of claim in Sessions Court laid before High Court before obtaining declaratory order in High Court – Whether declaratory order enforceable – Road Transport Act 1987, s. 96*

The plaintiffs commenced an action for negligence against the second and third defendants at the Sessions Court ('the SC suit') based on the allegation that the motorcycle ('the vehicle') driven by the second defendant was involved in a vehicular collision with the motorcycle driven by the first plaintiff. The vehicle was insured by the first defendant in the name of the third defendant to cover third party risk ('the policy') for the period from 26 February 2013 to 25 February 2014. As a result of the collision, the first plaintiff sustained severe head injuries leading to total paralysis from the neck below. The first plaintiff's parents, the first and second plaintiffs, alleged that they have to take care of the first plaintiff and consequently, they suffered considerable loss of income and claimed for special damages of the same. As insurer of the second and third defendants, the first defendant applied to be a party to the SC suit pursuant to s. 96(1) of the Road Transport Act 1987 ('RTA') and argued that the plaintiffs' claim was fraudulent and that there was in fact no collision. While the SC suit was pending, the first defendant filed an action at the High Court ('the HC suit'), claiming declaratory relief to the effect that the policy was void and unenforceable based on grounds of fraud and collusion. The third defendant did not contest to the HC suit and the High Court granted a declaratory order under s. 96(3) of the RTA to the effect that the policy was void and unenforceable ('the declaratory order').

In the meantime, the trails of the SC suit proceeded and the plaintiffs obtained judgment against the second and third defendants. In the present application, the plaintiffs sought an order to quash the declaratory order and to declare the policy valid on the grounds that: (i) the plaintiffs were not notified of the HC suit; (ii) in procuring the declaratory order, the first defendant failed to prove fraud against the plaintiffs; and (iii) the full facts of the plaintiffs' claim in the SC suit was not laid before the High Court by the first defendant before obtaining the declaratory order.

Held (order accordingly):

(1) It is clear from the words in s. 96(3) of the RTA that the first defendant was absolved from any statutory liability to pay on the policy, if before the date the liability was incurred, it obtained a declaration from a court of competent jurisdiction that the policy was void or unenforceable and further provided that the first defendant had complied with the proviso to that section. The declaratory order was obtained in the HC suit before the judgment was pronounced in the SC suit. (paras 20 & 23)

(2) The plaintiffs had indeed obtained judgment in proceedings before commencement of the HC suit. The SC suit commenced first in time and was in progress when the first defendant filed the HC suit and obtained the declaratory order. In fact, when the HC suit was filed, not only did the first defendant have full notice of the SC suit but was on its own application joined as a party to the SC suit and had also instructed solicitors to act for the second and third defendants. (para 24)

(3) Although the first defendant had obtained a declaratory order to the effect that the policy was void and unenforceable, the first defendant could not derive benefit of the declaratory order as against the judgment obtained by the plaintiffs in SC suit because of the proviso s. 96(3) of the RTA. Provided that the plaintiffs shall have complied with the requirement of s. 96(1) and (2) of the RTA particularly in respect of the statutory notice required to be served thereunder, the plaintiffs' statutory rights against the first defendant under Part IV of the RTA in respect of seeking satisfaction of the judgment obtained in the SC suit was preserved. (paras 27 & 28)

(4) The plaintiffs had the right under s. 96(1) of the RTA to enforce the said judgment against the first defendant. Therefore, while the declaratory order shall be operative and binding against the first and third defendants, as contracting parties to the policy and as parties to the HC suit, the first defendant could not entitle the plaintiffs of their third party statutory rights found in s. 96(1) of the RTA 1987, by virtue of that declaratory order. The plaintiffs' statutory rights under s. 96(1) of the RTA were fully-preserved notwithstanding the declaratory order. (paras 29, 30 & 31)

Case(s) referred to:
Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***
Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***
Manokaram Subramaniam v. Ranjid Kaur Nata Singh [2008] 6 CLJ 209 FC ***(refd)***
Pacific & Orient Insurance Co Bhd v. Kamacheh Karuppen [2015] 4 CLJ 54 CA ***(refd)***
Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA ***(refd)***

Legislation referred to:
Road Transport Act 1987, ss. 90(1), 96(1), (2)(a), (3)

Other source(s) referred to:
S Santana Dass, *The Law of Motor Insurance*, p 230

For the plaintiffs - Rajan Ayappan (Mabel Sebastian with him); M/s Sabastian & Co
For the 1st defendant - R Kamalanathan Ratnam (Vinod R Kamalanathan with him); M/s Vinod Kamalanathan & Assocs
For the 3rd defendant - In person

Reported by Najib Tamby

JUDGMENT

Vazeer Alam Mydin Meera J:

[1] The first defendant, an insurance company, had issued a third party risk motor insurance policy No. 01-70-13-EV-000949 in the name of the third defendant ("the policy") to cover third party risk for motorcycle bearing Registration No. WFE 1937 ("the vehicle") for the period from 26 February 2013 to 25 February 2014.

[2] The plaintiffs commenced an action in negligence against the second and third defendants at the Selayang Sessions Court on 11 February 2014 *vide* Writ of Summons No. A53KJ-38-02-2014 ("Sessions Court suit"). In the Sessions Court suit, the plaintiffs allege that on 1 May 2013 the vehicle driven by the second defendant was involved in a vehicular collision with a motorcycle driven by the first plaintiff.

[3] The plaintiffs further allege that the collision was caused by the negligence of the second defendant, as tortfeasor, and as a result of that the first plaintiff had sustained severe head injuries leading to total paralysis from the neck below. The second and third plaintiffs as parents of the first plaintiff allege that they have to take care of the first plaintiff and as a result have suffered considerable loss of income and claim special damages in respect of the same.

[4] The plaintiffs claim that prior to the commencement of the Sessions Court suit they had through their solicitors served onto the first defendant the requisite statutory notice under s. 96(2) of the Road Transport Act 1987.

[5] The first defendant, as the insurer of the policy, then appointed and instructed the firm of Messrs Azim, Tunku Farik & Wong, as solicitors to act for the second and third defendants in the Sessions Court suit. Subsequently, upon an application by the first defendant, the first defendant was by an order of the Sessions Court added as a defendant in the Sessions Court suit. The first defendant then filed a defence in which the first defendant alleged that the plaintiffs' claim was fraudulent and that there was in fact no collision involving the vehicle as alleged by the plaintiffs.

[6] The reason why the first defendant as insurer of the policy instructed solicitors to act for the second and third defendants in the Sessions Court suit and also applied to be made a party to the said suit is because of the provisions of s. 96(1) of the Road Transport Act 1987, that deals with the duty of insurers to satisfy judgments against persons insured in respect of third party risks. Section 96(1) of the Road Transport Act 1987 reads:

> If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

[7] Ordinarily a non-motor third party risk insurance policy works on the basis of contractual principles in which the insurer indemnifies the insured in respect of any third party claims to which the insured becomes liable, and in such policies there is no direct *nexus* between the insurer and the third party such that the third party makes a direct claim against the insurer.

[8] However, by virtue of the provisions of the Road Transport Act 1987, a third party risk motor insurance policy works differently. Pursuant to s. 96(1) of the Road Transport Act 1987, a third party who has obtained a judgment against the insured in a third party risk motor insurance policy can directly seek payment from the insured provided that the third party had in respect of such judgment complied with the provisions of s. 96(2)(a) of the Road Transport Act 1987, particularly the requirement to serve the insurer with a notice of the proceedings, before or within seven days after the commencement of the proceedings in which the judgment was given and further provided that none of the other qualifying provisos in s. 96(2) of the Road Transport Act 1987, applied.

[9] Part IV of the Road Transport Act 1987, entitled – "provisions against third party risks arising out of the use of motor vehicles" provides the legislative scheme in respect of mandatory third party risk motor insurance policy cover for motor vehicles used on roads. This is provided in s. 90(1) of the Road Transport Act 1987 that reads:

> Subject to this Part, it shall not be lawful for any person to use or to cause or permit any other person to use, a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part.

[10] The learned Ariffin Zakaria FCJ (now CJ) in speaking for the Federal Court in the case of *Manokaram Subramaniam v. Ranjid Kaur Nata Singh* [2008] 6 CLJ 209; [2009] 1 MLJ 21 FC, reaffirmed the fundamental rule of statutory interpretation, that is, the courts must give effect to the intent of the legislature, and that intention has to be found by an examination of the language used in the statute as a whole. When the Road Transport Act 1987, in particular Part IV thereof is examined as a whole, it is clear that the intent of Parliament was to put in place a mandatory third party risk motor vehicle insurance scheme, by which any third party who has suffered damage occasioned by a motor vehicle user insured under the scheme would be statutorily indemnified by the insurance company issuing the policy of insurance.

[11] This legislative scheme was recognised by the Court of Appeal in *Pacific & Orient Insurance Co Bhd v. Kamacheh Karuppen* [2015] 4 CLJ 54, where the learned Md Raus Sharif PCA in delivering the judgment of the court had adopted with approval the view expressed by S Santana Dass at p. 230 of his book entitled '*The Law of Motor Insurance*' to the following effect:

> ... if a judgment has been entered against the insured/driver and he does not pay the judgment, the third party can enforce the judgment directly against the insurer under Section 96 of the RTA. Section 96 allows a direct action by the third party against the insurer "with respect to a matter which is required to be covered by a policy of insurance". The policy must cover any liability which may be incurred by the insured arising out of the use of the motor vehicle by him.

The Court of Appeal in that case further held that:

> The right of the respondent as a third party to approach the court for redress against the appellant, who itself is not a tortfeasor and with whom the respondent had no contractual relationship arises from statutory empowerment under s. 96 of the RTA 1987. The mechanism of s. 96 of the RTA 1987 operates thus: there is a statutory obligation created by s. 96 of the RTA 1987 on the part of the insurer (appellant) on being so notified on the failure of the insured to pay up the judgment sum that

A the insured had failed to be satisfied in favour of the third party. This duty to pay up is statutory in origin and as said earlier is an exception to the concept founded upon privity of contract.

[12] The legislative scheme in Part IV of the Road Transport Act 1987, allows, in limited circumstances, for an insurer to be absolved of its liability B to pay any third party's judgment against the insured. This is provided in s. 96(3) of the Road Transport Act 1987, which reads as follows:

> No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:
>
> C
>
> > Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice to the person who is the plaintiff in the D said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

[13] Now, whilst the Sessions Court suit was pending, the first defendant E had filed an action against the third defendant at the Kuala Lumpur High Court *vide* Originating Summons No. 24NCC-391-10-2014 ("High Court suit") claiming declaratory relief to the effect that the policy was void and unenforceable based on grounds of fraud and collusion.

[14] The third defendant did not contest the High Court suit and on F 1 December 2014 the High Court granted a declaratory order under s. 96(3) of the Road Transport Act 1987, to the effect that the policy was void and unenforceable ("declaratory order").

[15] It is common ground that the plaintiffs were not given any notice of the High Court suit in which the declaratory order was obtained. The first G defendant has not proffered any reasons as to why the plaintiffs were not given any notice of the High Court suit, apart from saying that they are not obliged in law to do so.

[16] Thereafter, the first defendant instructed Messrs Azim, Tunku Farik & Wong to discharge themselves as solicitors for the second and third H defendants in the Sessions Court suit. Neither did the first defendant partake in the Sessions Court suit, thereafter. The second and third defendants were left unrepresented at the Sessions Court suit. The trail of the Sessions Court suit proceeded and the plaintiffs obtained judgment against the second and third defendants.

I **[17]** The plaintiffs *vide* this originating summons seek an order of this court to quash the declaratory order and to declare that the policy is still valid. The primary grounds relied on by the plaintiffs are as follows:

(i) the plaintiffs were neither made a party in the High Court suit nor were they notified of the High Court suit;

(ii) the first defendant had failed to prove fraud against the plaintiffs when procuring the declaratory order; and

(iii) the full facts of the plaintiffs' claim in the Sessions Court suit was not laid before the High Court by the first defendant before obtaining the declaratory order.

[18] The plaintiffs were essentially seeking to set aside the declaratory order based upon the principles pronounced by the Federal Court in *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143 and by the then Supreme Court in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393. Parties had filed their respective affidavits and written submissions. I had also heard further lengthy oral arguments of counsel.

[19] If the first defendant seeks to be absolved of its statutory liability under s. 96(1) of the Road Transport Act 1987, to satisfy the plaintiffs' judgment obtained in the Sessions Court suit based on the declaratory order, then obviously the statutory rights and interest of the plaintiffs are affected. Thus, the plaintiffs have, in my opinion, sufficient cause and interest to commence this action.

[20] In essence, this application involves the interpretation of s. 96(3) of the Road Transport Act 1987. Now, it is clear from the words of the statutory provision in s. 96(3) of the Road Transport Act 1987, that the first defendant is absolved of any statutory liability to pay on the policy, if before the date the liability was incurred, it obtains a declaration from a court of competent jurisdiction that the policy was void or unenforceable and further provided that the first defendant had complied with the proviso to that section.

[21] Pursuant to the proviso to s. 96(3) of the Road Transport Act 1987, even if the first defendant were to obtain a declaration as aforesaid, the first defendant, as the insurer under the policy, shall not:

> ... become entitled to the benefit of this subsection as respects any **judgment obtained in proceedings commenced before the commencement of that action** unless, before or within *seven days after the commencement of that action, he has given notice to the person who is the plaintiff in the said proceedings* specifying the grounds on which he proposes to rely ... (emphasis added)

[22] In the premise, to determine the validity of the declaratory order as against the plaintiffs, who were not parties to the High Court suit, several questions need to be asked and answered.

[23] The first question is this. Was the declaratory order obtained before the date the liability was incurred? The answer to that question is yes. The date the liability is incurred by the first defendant in respect of the policy correlates to the date on which the plaintiffs in the Sessions Court suit obtained judgment. The uncontroverted fact is that the declaratory order was obtained in the High Court suit before judgment was pronounced in the Sessions Court suit. Therefore, the first requirement of s. 96(3) of the Road Transport Act 1987, has been fulfilled.

[24] The second question that needs be answered is this: Was the plaintiffs' judgment in the Sessions Court suit "obtained in proceedings commenced before the commencement of" the High Court suit in which the declaratory order was obtained. From the evidence it is quite clear that the plaintiffs had indeed obtained judgment in proceedings before commencement of the High Court suit. The Sessions Court suit was commenced first in time and was in progress when the first defendant filed the High Court suit and obtained the declaratory order. In fact when the High Court suit was filed, not only did the first defendant have full notice of the Sessions Court suit, but was on its own application joined as a party to the Sessions Court suit and had also instructed solicitors to act for the second and third defendants.

[25] The third question that needs answering is this: Did the first defendant give the plaintiffs, who were the plaintiffs in the Sessions Court suit, notice of the High Court suit as required under the proviso to s. 96(3) of the Road Transport Act 1987, specifying the grounds on which the first defendant was relying to avoid the policy? The answer to that question is in the negative. In fact learned counsel for the first defendant concedes that no such notice was given to the plaintiffs.

[26] There is clear legislative intent that in situations where there is in existence court proceedings such as the Sessions Court suit between an insured tortfeasor and an injured third party, and where the plaintiffs therein have potential statutory rights under Part IV of the Road Transport Act 1987 to seek payment on judgment pronounced in such a suit from the insurer, notice shall be given to the plaintiffs if the insurer seeks to avoid the policy of insurance by seeking a declaration in the court to that effect. If the insurer chooses not to serve such statutorily required notice, then the insurer must live with the consequences of that choice. And that consequence is that any such declaratory order would not entitle the insurer to be absolved of its statutory obligations under s. 96(1) of the Road Transport Act 1987. If the court were to hold otherwise, not only would that be contrary to the intent of Parliament in legislating such a motor insurance scheme, but also it would be grossly inequitable to third parties such as the plaintiffs.

[27] In the premise, the clear conclusion to be drawn is that though the first defendant has obtained a declaratory order to the effect that the policy is void and unenforceable, the first defendant cannot derive benefit of the declaratory order as against the judgment obtained by the plaintiffs in the Sessions Court suit, because of the proviso to s. 96(3) of the Road Transport Act 1987.

[28] In the circumstance, provided that the plaintiffs shall have complied with the requirements of s. 96(1) and (2) of the Road Transport Act 1987, particularly in respect of the statutory notice required to be served thereunder, the plaintiffs statutory rights against the first defendant under Part IV of the Road Transport Act 1987, in respect of seeking satisfaction of the judgment obtained in the Sessions Court suit is preserved.

[29] The plaintiffs have the right under s. 96(1) of the Road Transport Act 1987, to enforce the said judgment against the first defendant, as was pronounced by the Court of Appeal in *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947.

[30] Therefore, whilst the declaratory order shall be operative and binding against the first and third defendant, as contracting parties to the policy and as parties to the High Court suit, the first defendant cannot disentitle the plaintiffs of their third party statutory rights found in s. 96(1) of the Road Transport Act 1987, by virtue of that declaratory order. The plaintiffs statutory rights under s. 96(1) of the Road Transport Act 1987, are fully preserved notwithstanding the declaratory order.

[31] Wherefore, whilst declining to make the orders sought in prayers (a) and (b) of the originating summons to set aside the declaratory order, for that is the matter entirely between the first and third defendants, I will in the interest of justice make the following declaration, that is, pursuant to the proviso to s. 96(3) of the Road Transport Act 1987, the first defendant is not entitled to the benefit of the declaratory order as against the judgment obtained by the plaintiffs in the Sessions Court suit provided that the plaintiffs shall have complied with the statutory requirements of s. 96(1) and (2) of the Road Transport Act 1987.

[32] There shall be no order as to cost.